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Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1316

TURNER ELKHORN MINING COMPANY, ET AL.,

Appellants,

vs.

PETER J. BRENNAN, SECRETARY OF LABOR, and CASPAR W. WEINBERGER, SECRETARY OF HEALTH, EDUCATION AND WELFARE,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Kentucky

JURISDICTIONAL STATEMENT

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In The

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October Term, 1974

No.

TURNER ELKHORN MINING COMPANY, ET AL.,

Appellants,

vs.

PETER J. BRENNAN, SECRETARY OF LABOR, and CASPAR W. WEINBERGER, SECRETARY OF HEALTH, EDUCATION AND WELFARE,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Kentucky

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JURISDICTIONAL STATEMENT

Appellants appeal from Paragraph (3) of the judgment order of the United States District Court for the Eastern District of Kentucky entered on November 19, 1974, denying in part the injunctive and declaratory relief prayed for in Appellant's complaint. A copy of the Court's order is

reproduced herein as Appendix A. Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are presented.

OPINION BELOW

The Memorandum Opinion of the District Court for the Eastern District of Kentucky, Pikeville Division, is reported at 385 F. Supp. 424, and is reproduced herein as Appendix B.

JURISDICTION

This action was brought under 28 U.S.C. §1331 to enjoin the implementation and enforcement of certain provisions of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1972, on the ground that said Act of Congress is, in part, repugnant to the Constitution of the United States. Injunctive relief also was sought against the application and operation of certain administrative regulations promulgated under said Act. The action was heard and determined by a District Court of three judges under 28 U.S.C. §2284 as required by 28 U.S.C. §2282. The District Court's judgment granting in part and denying in part the permanent injunctive relief sought was entered on November 19, 1974, and notice of appeal (Appendix C hereto) was filed in that court on January 20, 1975. On January 16, 1975, the Secretaries of Labor and Health, Education and Welfare, appellees here-

in, filed notice of appeal to this Court from an order of the District Court entered on December 17, 1974 denying their motion to amend the District Court's judgment order. The jurisdiction of the Supreme Court to review this decision on direct appeal is conferred by Title 28, United States Code, Sections 1252, 1253 and 2101(b).

QUESTIONS PRESENTED

1. Do the provisions of the Coal Mine Health and Safety Act requiring individual coal mine operators to pay benefits to their former employees (or their survivors) in connection with occupational disease incurred prior to enactment of the law constitute an arbitrary and irrational legislative means for providing economic relief to financially distressed inactive miners and their families, in violation of rights guaranteed Appellants by the Due Process Clause of the Fifth Amendment of the Constitution?

2. Has Congress violated rights guaranteed Appellants under the Due Process Clause of the Fifth Amendment of the Constitution by subjecting them to a statutory scheme of compensation for total disability due to occupational disease which, by virtue of arbitrary, over-inclusive legislative presumptions and eligibility criteria incorporated therein, will require coal mine employers to pay benefits to claimants who actually are disabled by nonwork-related diseases, and to claimants whose diseases may or may not be work-related, but who in any event, are not actually totally disabled at all?

STATUTES INVOLVED

Title IV of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 742, 30 U.S.C. §§901, *et seq.*, as amended by the Black Lung Benefits Act of 1972, 86 Stat. 150, the relevant provisions of which are set out in Appendix D hereto.

STATEMENT

Appellants are 22 coal mine operators who are subject to novel legal and economic burdens imposed by Title IV of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 742, 30 U.S.C. §§901, *et seq.*, as amended by the Black Lung Benefits Act of 1972, 86 Stat. 150 (hereinafter "Title IV" or "The Act"). This action was instituted to enjoin the Secretaries of Labor and Health, Education and Welfare from enforcing this law against Appellants on the grounds that it is inconsistent with their rights under the Constitution and laws of the United States.

The legislation in question establishes a scheme of economic relief for former coal mining employees and their families that is completely without precedent or parallel in federal or state legislation. Title IV consists of three parts: Part A (§§401, 402; 30 USC 901, 902) contains a general statement of the purpose of the title, and defines certain terms used in the title. Part B (§§411-415; 30 USC

921-925) creates a program for the processing and payment out of federal revenues of claims for black lung benefits filed on or before December 31, 1973, and Part C (§§421-431; 30 USC 931-941) creates a program under which mine operators are responsible for the payment of benefits after December 31, 1973.

Congress intended Title IV to serve two different purposes: to provide benefits to a "significant" number of coal miners who were totally disabled by pneumoconiosis at the time of enactment of the law, and to the survivors of miners who had died of the disease prior to enactment; and to ensure that in the future adequate benefits would be available to miners and their families in the event of total disability or death due to the disease. Act §401; 30 USC 901. Congress has defined "total disability" for the purposes of the Act as having the meaning given it by regulations of the Secretary of HEW, ". . . except that such regulations shall provide that a miner shall be considered totally disabled when pneumoconiosis prevents him from engaging in gainful employment requiring the skills and abilities comparable to those of employment in a mine or mines in which he previously engaged with some regularity and over a substantial period of time." Act §402 (f); 30 USC 902 (f).

The two benefits programs created by Title IV do not coincide with its two separate purposes. The federally-financed Part B was not intended to, nor did it function to provide benefits in all cases of black lung disability or death that had arisen prior to enactment of the law, and the operator-funded Part C was not intended to, and in operation is not limited to miners now actively employed in mining activities who may become eligible in the future.

The distinction between the two benefits programs primarily is chronological.

The benefits program created by Part B of the Act is administered by the Secretary of the Department of Health, Education and Welfare through the Social Security Administration. Section 411, 30 USC 921, directs the Secretary to "make payments of benefits in respect of total disability of any miner due to pneumoconiosis, and in respect of the death of any miner whose death was due to pneumoconiosis or who at the time of his death was totally disabled by pneumoconiosis", and sets out certain presumptions concerning the existence of the disease and its causation which the Secretary is required to apply in determining a claimant's entitlement to benefits.

In the case of a miner who was employed in one or more coal mines for ten years or more and suffers or suffered from pneumoconiosis, it will be presumed that he developed the disease as a result of such employment; in the case of a deceased miner who was so employed and who died of a respirable disease, it will be presumed that he died due to pneumoconiosis; and in the case of a miner who was employed in an underground coal mine (or on the surface under similar conditions) and who suffers or suffered from totally disabling respiratory or pulmonary impairment, it will be presumed that he is totally disabled by pneumoconiosis, or that he died of it, or was totally disabled by it when he died.

Part C of the Act was designed to handle only those claims filed after the termination of the Part B program

and before December 31, 1981[1] by persons who are not entitled to benefits under the workmen's compensation law of a state formally recognized by the Secretary of Labor as affording coverage equivalent in scope to that of the federal law. Act §421(a); 30 USC 931(a). No State's compensation law has qualified for such official recognition by the Secretary of Labor, and there is little prospect that any state will so qualify. Part C, therefore, constitutes, for all practical purposes, a single-disease, single-industry, federal workmen's compensation statute.

As under Part B, claimants may be found eligible for benefits under Part C even if the disability or death upon which the claim is based occurred before enactment of the law, and even if the miner was not employed in mining at the time. The only limitation is that claims must be filed within three years of discovery of total disability due to pneumoconiosis, or of the date of death. Act §422(f)(1); 30 USC 932(f)(1). This means, for example, that men who have not worked in the mines since before the Second World War could be eligible for benefits under Part C, even taking into account the 3-year filing limitation. Under the definitions, standards and presumptions of this law, breathing impairments common to the aging non-mining popula-

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[1] Section 422(e); 30 USC 932(e) provides that "no payment of benefits shall be required under this section: . . . (2) for any period prior to January 1, 1974; or (3) for any period after twelve years after the date of enactment of this Act." While it would appear that the language of subparagraph (3) requires that all *benefit payments* terminate in 1981, Appellants understand that the Secretary of Labor interprets the language to mean that no new claims will be considered after that date, but benefits awarded on claims filed prior to that date will be payable for the life-time of the recipient or recipients. Legislative history does not resolve the ambiguity in this language.

tion which are not *medically* identifiable as coal workers' pneumoconiosis, and not in fact totally disabling would be *legally* considered to be both for purposes of awarding benefits. The resulting tendency of the law to award benefits to persons with respiratory ailments of any nature simply because they have a mine work history is one of the principal points of contention in this suit.

With minor exceptions, the Part B definitions, standards and presumptions governing the determination of whether a miner has or had pneumoconiosis and is or was "totally disabled" by it, also govern such determinations under Part C. The present discounted value of a Part C claim is estimated to be over $68,500.[2]

Immediately prior to the original enactment of the Coal Mine Health and Safety Act in 1969, congressional proponents of the Black Lung Benefits title of the Act estimated that there were approximately 50,000 retired and disabled miners and 3,300 active miners who could qualify for benefits upon enactment, and that the cost of the program could be no more than $120 million per year.[3]

In May of 1972, Title IV was amended to extend by 18 months the time within which claims for federal lifetime benefits could be filed, the claimant's burden of proving his claim was eased by adoption of a liberalized

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[2] Affidavit of J. Huell Briscoe, actuary, submitted in support of Appellants' Motion for Summary Judgment filed in the District Court February 15, 1974.

[3] House Comm. on Education and Labor, 91st Cong. 2d Sess., *Legislative History Federal Coal Mine Health and Safety Act* 1114, 1078, 1148 (Comm. Print 1970) (Hereinafter cited as "*1969 Legislative History*").

definition of total disability, medical proof requirements were drastically relaxed, surface miners were brought within the Title, additional dependents and survivors were made eligible, and the Social Security Administration was ordered to reconsider most of the claims it previously had denied on the basis of the stricter eligibility criteria.

At the close of the Part B program on June 30, 1973, some 295,000 claims had been allowed (175,000 miners; 120,000 widows and other survivors) and about 145,000 were pending. The Department of Health, Education and Welfare projected a cumulative benefits outlay of $2.7 billion by the end of fiscal year 1974. The recurring outlay was expected to be $74 million per month by that date[4]—a *monthly* cost approaching the annual cost projected four years previously.

On July 1, 1973, the Department of Labor began entertaining claims for which mine operators could be held liable. On July 11, 1973, the Department of Labor estimated in Senate budget hearings that 40,000 claims would be received in fiscal year 1974, that approximately 32,000 (or 80%) of them would be approved, and that 50% of those approved would be found to be the responsibility of mine

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4 These figures are contained in the Statement of Stephen Kurzman, Assistant Secretary for Legislation, Dep't. of Health, Education & Welfare, before the House General Subcomm. on Labor, of the Comm. on Education and Labor, presented July 17, 1973. (pp. 7-8).

operators.[5] As of February 14, 1975, 59,300 claims had been filed.[6]

In August of 1973, the mine operator Appellants filed suit to enjoin the implementation and enforcement of the Part C program on four grounds. First, that imposing liability on them to pay benefits to former employees or their survivors in connection with occupational disease incurred prior to enactment of the law violates their rights to due process and equal protection of law. Second, that the period-of-employment presumptions set out in Clauses (1), (2) and (4) of Section 411(c) of the Act, 30 USC 921 (c), are unconstitutionally arbitrary and irrational bases upon which to predicate coal mine operators' liability to pay benefits. Third, that regulations promulgated by the Secretary of Labor governing the determination of the particular employer to be held liable on a particular claim embodied arbitrary and irrational irrebutable presumptions which violate the employer's right to due process of law. And, fourth, that regulations of the Department of Labor imposing liability on coal mine operators to pay medical benefits to claimants already receiving federally financed

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[5] Senate Committee on Appropriations, 93rd Cong., 1st Sess. (1973) *Hearings on Fiscal Year 1974 Appropriations for The Departments of Labor, Health, Education and Welfare, and Related Agencies 2695.*

[6] Bureau of National Affairs, Daily Labor Report, Full Text Section, *Labor Department Statement on Black Lung Bill (H.R. 8) Before House Labor Subcommittee on Labor Standards*, p. G-1 (March 6, 1975). According to this statement, 54,350 of these claims were in process in the Department of Labor. Preliminary determinations concerning eligibility had been made in 33.9 per cent of these filings. Initial determinations favorable to the claimant on the medical evidence submitted were made in 21.9 per cent of the cases.

indemnity benefits under the Part B program are not authorized by the Act.

In February, 1974, Appellants filed a motion for summary judgment supported by answers to interrogatories, responses to requests for admission of facts, depositions, affidavits of a medical expert and an actuarial expert, and documents produced by the Labor Department. The Government filed a motion to strike all of the evidence submitted in support of the summary judgment motion, a motion to dismiss the action, and a cross-motion for summary judgment, which was not supported by any evidentiary matter.

In its decision of November 19, 1974, the three-judge District Court held as to Appellants' first claim, that ". . . the decision of Congress to impose [liability on operators] on what may be called remote claims of those former miners no longer in the work force was an exercise of its lawful power under the Constitution." (App. B, p. 6b). The Court also upheld the constitutionality of the period-of-employment presumptions in Clauses (1), (2) and (4) of Section 411(c) of the Act, 30 USC 921(c), apparently on the grounds that the presumptions were rational and capable of being rebutted. (App. B, pp. 9b-10b). The Court did, however, find the presumption governing determination of total disability set out in Clause (3) of Section 411(c), 30 USC 921(c), and the limitation of rebuttal evidence in the last sentence of Clause (4) of Section 411(c), 30 USC 921(c), violative of mine operators' rights under the Due Process Clause of the Fifth Amendment (App. B, pp. 9b-11b), and enjoined the Secretary of Labor from applying them. (App. A, p. 1a).

The three-judge Court ruled that it had no jurisdiction to consider the issues raised concerning the validity of the Secretary's regulations and remanded those issues, and any others remaining, for decision by the District Judge who requested convocation of the three-judge panel. (App. A, p. 1a; App. B, pp. 1b, 13b).

THE QUESTIONS ARE SUBSTANTIAL

The statute in question represents a unique congressional experiment in the use of workmen's compensation mechanisms as a means to achieve legislative ends alien to the limited purposes such laws rationally and constitutionally can serve. The employer liability provisions of Title IV are unique in two respects: they are used as a vehicle for providing economic relief in the nature of reparations to persons who had left the work force prior to enactment of the law, and the eligibility for benefits of former and present employees is dictated substantially by statutory presumptions and other eligibility criteria governing the determination of disability due to occupational disease which make the law over-inclusive and lend it the character of a pension law, not a workmen's compensation law. In each of these respects the law seriously implicates Appellants' rights under the Constitution.

1. The issue in this case is not whether it is permissible for Congress to create a program of financial relief for physically and economically disabled inactive coal miners and their families. Appellants recognize that to be a legitimate object of the federal legislative power. The question here is whether Congress has chosen an unconstitutionally arbitrary and unfair means to accomplish that end in singling out individual mine operators to finance this relief

on the basis of past employment relationships—many of which ended years, or even decades, prior to passage of the law.

The Constitution's guarantee against arbitrary, irrational or unfairly discriminatory legislative acts, whether founded on principles of due process or equal protection of law, extends not only to legislative ends, but to the means by which those ends are achieved. See *James* v. *Strange,* 407 U.S. 128, 141 (1972); *Reed* v. *Reed,* 404 U.S. 71, 76 (1971); *Nashville, C. & St. L. Ry.* v. *Walters,* 294 U.S. 405, 413 (1935); Gunther, *The Supreme Court/1971 Term/ Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 Harv.L. Rev. 1, 23 (1972). These principles are applicable to federal legislation through the Due Process Clause of the Fifth Amendment. *Weinberger* v. *Wiesenfeld,* ..... U.S. ....., 43 U.S.L.Wk. 4393, 4394 fn. 2 (March 19, 1975). Recent decisions of this Court suggest that the means by which legislative purposes are achieved should be made the subject of a meaningful judicial scrutiny when challenged as violative of these principles, even though the legislation may not touch upon "fundamental" interests, or involve constitutionally "suspect" classifications. See *Weinberger* v. *Wiesenfeld,* ..... U.S. ....., 43 U.S.L.Wk. 4393, 4397-99 (March 19, 1975); *James* v. *Strange,* 407 U.S. 128, 134, 141 (1972); *Reed* v. *Reed,* 404 U.S. 71, 76 (1971); *Eisenstadt* v. *Baird,* 405 U.S. 438, 448 (1972); *Weber* v. *Aetna Cas. & Surety Co.,* 406 U.S. 164, 170 (1972); *Cleveland Bd. of Education* v. *LaFleur,* 414 U.S. 632, 655 (1974) (Concurring Opinion of Powell, J.); *Frontiero* v. *Richardson,* 411 U.S. 677, 691 (1973) (Concurring Opinion of Powell, J., Burger C.J. and Blackmun, J.) *City of New York* v. *Richardson,* 473 F.2d 923, 930-31 (2d Cir. 1973); *Samuel* v. *Univer-*

sity of Pittsburgh, 375 F.Supp. 1119, 1132-34 (W.D. Pa. 1974).

Legislation that attaches new legal rights and duties to pre-enactment transactions, occurrences and conduct, as the legislation in question here does, long has been recognized as constitutionally suspect because of its great potential for violating the guarantee of fundamental fairness inherent in the Due Process Clauses of the Fifth and Fourteenth Amendments, see generally: *Railroad Retirement Board* v. *Alton R. Co.,* 295 U.S. 330, 350 (1935); *Nichols* v. *Coolidge,* 274 U.S. 531, 542 (1927); *Cohen* v. *Beneficial Loan Corp.,* 337 U.S. 541, 554 (1949) (*dictum*); *Chase Securities Corp.* v. *Donaldson,* 325 U.S. 304, 315-16 (1945) (*dictum*); *Mora* v. *Mejias,* 223 F.2d 814, 816, 819 (1st Cir. 1955); Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking,* 48 Calif. L. Rev. 216, 221-225 (1960); Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation,* 73 Harv.L.Rev. 692 (1960); Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence,* 20 Minn.L.Rev. 775, 782, 791 (1936), and consequently, should be subjected to a scrutiny more careful than that demanded in the case of constitutional challenges to laws affecting economic interests, but not sharing that characteristic.

A proper examination of the relationship between the purposes of the legislation in question and the means devised by Congress to achieve those purposes would reveal the error of the District Court's holding that the operator-liability provisions of Title IV represent a rational exercise of lawful congressional powers. (App. B, p. 6b). The constitutional vice of the black lung benefits law is that Congress has attempted to employ traditional workmen's compensation concepts and mechanisms to accomplish two

very different ends: (1) to insure that men working in coal mines now and in the future will be compensated if they become disabled by coal workers' pneumoconiosis, and (2) to provide economic relief for large numbers of financially distressed ex-miners (and their families or survivors) who worked in coal mines in years past and did not have the benefit of workmen's compensation coverage of this nature. The first is an appropriate subject for compensation law, but the second is not.

The early legislative history of Title IV clearly reflects a congressional belief that economic relief should be provided out of federal revenues for aging and disabled inactive mine workers and their families as a matter of national moral obligation.[7] The workmen's compensation

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[7] *1969 Legislative History*, Note 3, *supra*, at 256-57; 328; 338-39; 346; 569-71; 654; 719-20. For example, Senator Javits said (pp. 338-39):

> . . . [T]he entire Nation shares the responsibility for this tragic situation; witness after witness who testified on this bill stressed America's complete insensitivity to the problem of black lung until very recently—it was not until the mid-1950's that black lung was recognized by responsible medical authorities as a disease.

and Representative Perkins said (p. 654):

> The coal produced by these victims of black lung was sold throughout the United States at prices lower than it could have been if compensation costs had been paid at the time that the disability was incurred. Consequently, compensation for past damage to a coal miner's health can, we believe, logically be considered a national responsibility.

and Representative Dent said (pp. 719-20):

> The miners for whom this program is intended became victims of pneumoconiosis many years ago. They were mining coal for national consumption, and for an industry under intense Federal pressure to keep the cost of the fuel low. The entire Nation benefited from the use of coal and its low cost. The entire Nation then, has an obligation to the miners who became the unfortunate recipients of an insidious disease in the process, and to their widows and minor children.

provisions imposing liability on mine operators were added to the law on the eve of its enactment, virtually without congressional deliberation, and encompassed inactive, former mine workers as well as those presently in the work force.[8] Legislative history leaves no doubt that the provisions of Title IV granting benefits to inactive miners and their families are a reparations measure to secure for these persons present legal redress for harm suffered in the past that was not compensable at the time, but in hindsight is deemed to have been socially or morally reprehensible. In this respect, the law embodies the philosophy expressed in proposals for payment of reparations to Japanese Americans, American Indians and Black Americans.[9] Congress rationally might have chosen as its means to finance these reparations to impose that entire burden directly on the public, as it partially did in Part B of Title IV, or to impose it indirectly on the consumers of coal through a uniform exaction from the industry on the basis of size of payroll or production, which equitably could be passed on to consumers through pricing. Instead, Congress chose as its means the profoundly arbitrary and irrational scheme found in Part C of Title IV of imposing this economic burden on the former employers of inactive mine workers through the vehicle of a workmen's compensation law.

The provisions of Part C of Title IV imposing liability on a mine operator to pay benefits to his former employees

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[8] *1969 Legislative History*, Note 3, *supra*, at 1059-61, ff.

[9] See, *e.g.*, Rostow, *The Japanese American Cases—A Disaster*, 54 Yale L.J. 489, 533 (1945); *Otoe and Missouria Tribe of Indians* v. *United States*, 131 F.Supp. 265, 269, 272-73 (U.S.C.C. 1955) (discussing the purposes and policies underlying the Indian Claims Commission Act); Hughes, *Reparations for Blacks?*, 43 N.Y.U.L. Rev. 1063 (1968).

cannot seriously be defended as means of exacting reparations from the operator on the basis of his own past misconduct. To be so justified in the face of the requirements of due process of law, they would have to impose their burden on the blameworthy alone. Under Title IV, however, a mine operator is not singled out to bear the responsibility for paying benefits to any particular inactive miner-claimant (or claiming survivor) on the basis of evidence of irresponsible mining activity in the past, or evidence that he knowingly exposed his employees to hazards and failed to take heed of their need for protection, or any other considerations going to the question of the culpability of his past conduct.

Viewed as a legislative means for spreading these costs to the industry and eventually to the consumers of coal, these provisions are equally indefensible. The underlying philosophy of workmen's compensation laws is that economic losses suffered by workers as a result of disabling disease and injury incurred in connection with their labor should be borne by the consumers of the products whose production was the occasion for their losses. Workmen's compensation laws achieve this result by transferring the loss from the worker to his employer, who is better capable of passing the loss on to consumers through the price of the product, along with his other costs of production.[10]

Shifting the initial incidence of these losses to employers as a cost of production brings market forces to bear on

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[10] *See generally*: 1 Larson's Workmen's Compensation Law §2.20; Prosser, *Law of Torts* 530-31 (4th Ed. 1971); Riesenfeld, *Modern Social Legislation* 137-140 (1950); National Comm'n on State Workmen's Compensation Laws, *Compendium on Workmen's Compensation* 21-25 (1973).

relative economic efficiencies, which provides a powerful incentive for an employer to protect his employees against occupational hazards, because producers facing higher costs and lower profits due to poor safety records are competitively disadvantaged.[11] A producer's compensation costs are a function of both the degree of hazard to which his employees are exposed and the numbers of them so exposed. Assuming that a producer's use of labor is economically efficient, and that through health and safety measures he has minimized the risk of employee injuries, then his compensation costs should rise and fall along with his level of production and, consequently his revenues. In the instant case, however, Congress has chosen these mechanisms as the means by which the costs of providing benefits to inactive miners will be imposed upon mine operators just as if these costs arose out of losses incurred in connection with current mine production. Put to this use, compensation mechanisms cease to function rationally and become an arbitrary economic force.

If a mine operator has been in business longer than his competitor, or in the past has engaged in mining on a larger scale and employed greater numbers of mine workers than at present, or does business in an area where there is no alternative employment for his former employees,[12] he could be faced with a potential claims liability completely disproportionate to the number of miners he currently em-

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[11] See The Report of the National Commission on State Workmen's Compensation Laws 38, 39, 87 (1972).

[12] Under Title IV, inactive miners who are capable of working nevertheless are considered "totally disabled" and eligible for benefits if they cannot find coal mining employment or nonmining employment suitable to their age, education and experience in the immediate area of their residence. Act §402(f); 30 USC 902(f).

ploys—indeed, he could have more claims than he has employees. There is no way this operator can avert this potential liability through exercise of choice or modification of his conduct, as he is capable of doing in the case of his present work force. His competitor, unburdened by this liability, has the distinct advantage, even though both operators may employ the same number of miners in equally efficient and equally safe mining activities.

Since workmen's compensation insurance rates are established on a state-to-state basis, these same forces can operate with an equal vengeance on the entire mining industry of a state. In a state where mining has been a major factor in the state's economy for many years and which now numbers among its population a great many former miners who cannot find suitable nonmining employment, mine operators will be confronted with compensation costs much higher than those of competing operators in states where mining is a new industry, even though the two states' industries may be competitive when measured in terms of the cost-efficiency of current production. There is no justification for Congress having chosen a scheme for the economic relief of inactive miners that results in such arbitrary discriminations among competing mine operators otherwise similarly situated.

Title IV represents a radical and constitutionally suspect departure from traditional compensation theory. The theory of private reparations financing embodied in the law could become precedent for almost infinite permutations in legislative classification—of both those to bear the burden and those to gain the benefits of such laws. To Appellants' knowledge, neither Congress nor any state legislature has ever enacted an employer-financed workmen's

compensation law that covered persons who had ceased to be workmen prior to the enactment of the law. Appellants are aware of only one federal legislative parallel to the inactive-miner provisions of Title IV, and that is a provision in the Railroad Retirement Act of 1934 requiring railroads to finance pensions for workers who had retired within a year before enactment of the law. That provision was declared unconstitutional by this Court in *Railroad Retirement Board* v. *Alton R. Co.*, 295 U.S. 330 (1935)[13] on the ground that ". . . there can be no constitutional justification for arbitrarily imposing millions of dollars of additional liabilities upon the carriers in respect of transactions long closed on a basis of cost with reference to which their rates were made and their fiscal affairs adjusted." 295 U.S. at 354. The Due Process Clause of the Fifth Amendment should not be read to require any less in the way of legislative fairness today.

The court below erred in distinguishing *Alton* and upholding the statute on the basis that the liabilities it imposes sound in tort. (App. B, p. 5b). Actually, compensation laws represent a public superimposition of rights and duties on the employer-employee relationship in lieu of rights and duties sounding in tort, see *New York Central*

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[13] Appellants appreciate that the primary holding of the *Alton* case—that the Railroad Retirement Act as a whole was beyond Congress' powers under the Commerce Clause (Justices Roberts, Van Devanter, McReynolds, Sutherland and Butler for the majority; Chief Justice Hughes, and Justices Brandeis, Stone and Cardozo, dissenting)—has been severely criticized, along with many other decisions of that era, as representing a discredited judicial philosophy. But *Alton* was not a single issue case. Chief Justice Hughes, speaking for the four dissenters, agreed with the majority that the "retroactive" pension provision was ". . . arbitrary and beyond the power of Congress," 295 U.S. at 389, and Appellants are not aware that this unanimous view has lost its force.

R.R. Co. v. *White*, 243 U.S. 188, 203 (1917), and as such, should be considered no more or less quasi-contractual than a duty imposed by law to pay pensions to employees, and no less arbitrary when imposed after the employment relationship has ended.

2. The second major constitutional flaw in Title IV arises out of Congress' abandonment of the principle that workmen's compensation benefits ought to be paid only in connection with *work-related* disabilities. In the court below, Appellants contended that, notwithstanding its stated purposes, Title IV was over-inclusive as a matter of fact—that application of its provisions governing administrative determinations of compensable disease and disability[14] would, as a matter of fact, expose them to liability to persons who are not totally disabled at all, or who suffer from nonwork-related diseases common to the general population. These questions of fact were put at issue by Appellants' motion for summary judgment. The Secretary of Labor moved to strike all of Appellants' evidence on summary judgment as irrelevant, taking the position that the court was not permitted to consider such issues—that to do so would, in effect, invade the legislative prerogative. Although the District Court's holding is not expressly stated, its acceptance of the Secretary's position is clear from the sense of its opinion and the effect of its judgment. The District Court erred in refusing to undertake the factual inquiry required to rule on Appellants' motion for summary judgment.

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[14] The period-of-employment presumptions of §411(c); 30 USC 921(c); the diagnostic limitations of §413(b); 30 USC 923(b); the definition of total disability in §402(f); 30 USC 902.

Appellants' contention that Congress has created period-of-employment presumptions governing eligibility determinations that arbitrarily imbue cases of nonoccupational disease and disability with presumptive merit and hedged the claims determination process with medically invalid diagnostic limitations, demands factual resolution. This Court has said that statutory provisions that permit or compel inference of a fact from proof of another when there is no rational connection between the fact proved and the ultimate fact to be presumed therefrom, or that do not afford fair opportunity to rebut such presumptions even where a rational connection may exist, are forbidden by the Due Process clauses of the Fifth and Fourteenth Amendments because they amount to legislative arbitrariness. See, *e.g., Cleveland Bd. of Ed.* v. *LaFleur,* 414 U.S. 632, 644 (1974); *U.S. Dept. of Agriculture* v. *Murry,* 413 U.S. 508, 514 (1973); *Vlandis* v. *Kline,* 412 U.S. 441, 446 (1973); *Stanley* v. *Illinois,* 405 U.S. 645, 657 (1972); *Leary* v. *United States,* 395 U.S. 6, 31 (1969); *Tot* v. *United States,* 319 U.S. 463, 467 (1943); *Heiner* v. *Donnan,* 285 U.S. 312, 325 (1932); *Schlesinger* v. *Wisconsin,* 270 U.S. 230, 239-40 (1926). See also, *Andrews* v. *Drew Mun. Sch. Dist.,* 507 F. 2d 611, 614 (5th Cir. 1975); *Owens* v. *Roberts,* 377 F.Supp. 45, 52 (M.D. Fla. 1974); *Juster Bros.* v. *Cristgau,* 7 N.W.2d 501, 507 (Minn. 1943); *Carolene Milk Products Co.* v. *McLaughlin,* 5 N.E.2d 447, 450 (Ill. 1936). The case of *Owens* v. *Roberts, supra,* is especially pertinent to this case, because it involved a statutory presumption that was termed rebuttable, but in fact had been rendered irrebuttable by regulations promulgated under the statute. See 377 F.Supp. at 49-50.

Congress may not, by legislative fiat, enact into existence facts that do not, and which cannot be made to, exist in

actuality. See *Heiner* v. *Donnan,* 285 U.S. 312, 329 (1932). Courts, therefore, must determine the rationality of a statutory presumption as a matter of fact. This Court has said in the *Leary* case, *supra,* that in determining the rationality of presumptions dealing with matters not within specialized judicial competence or not completely commonplace, significant weight should be accorded the capacity of Congress to "amass the stuff of actual experience and cull conclusions from it"; but that, since such determinations are "empirical", courts must consider all relevant direct and circumstantial data. 395 U.S. at 38. In the *Leary* case itself, for example, this Court undertook an examination of floor debates, committee reports, testimony given at committee hearings, written statements and documents submitted to the committees, published reports of federal and state agencies dealing with collateral matters, and even current periodicals and books, in order to resolve the factual rationality of a statutory presumption. See 395 U.S. at 39-40.

Appellants believe that there was sufficient evidence of that nature before the District Court to justify summary judgment in their behalf, or at least sufficient to show that a material issue of fact was in dispute which required resolution at trial. Although the District Court applied the law discussed above in striking down a presumption contained in Title IV that expressly was irrebuttable, it did not address itself to Appellants' contention that the rebuttable presumptions of Title IV were, in fact, not fairly rebuttable, or had been rendered effectively irrebuttable by other provisions of the law and the regulations mandated thereunder—issues upon which findings of fact and conclusions of law should have been made. (See App. B, pp. 6b-9b). If judicial inquiry into issues of fact such as those

raised by Appellants in this case is forbidden, then constitutional safeguards against arbitrary statutory presumptions and over-inclusive legislative definitions are illusory.

CONCLUSION

For the reasons stated herein, it is submitted that the District Court failed to recognize and protect the constitutional rights of Appellants invaded by the legislation in question, that the questions raised by the lower court's decision are substantial and of public importance, and should be resolved by this Court.

Respectfully submitted,

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April, 1975

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 1761

TURNER ELKHORN MINING COMPANY,
a Kentucky Corporation, ET AL,

Plaintiffs,

VS: ORDER

PETER J. BRENNAN, Secretary of the United States Department of Labor, an Agency of the Federal Government, and CASPAR W. WEINBERGER, Secretary of the United States Department of Health, Education and Welfare, an Agency of the Federal Government,

Defendants.

In conformity with the Memorandum Opinion this date entered herein,

IT IS ORDERED AND ADJUDGED HEREIN AS FOLLOWS:

(1) That the irrebutable presumption set forth in 30 U.S.C. 921(c)(3) and the limitation of evidence necessary to rebut the presumption created in 30 U.S.C. 921(c)(4) are violative of the United States Constitution.

(2) That the Secretary of Labor shall no longer seek to apply the irrebuttable presumption made by 30 U.S.C. 921(c)(3) or to limit evidence in rebuttal to the presumption created in 30 U.S.C. 921(c)(4).

(3) That all other provisions of the Act which have been considered are permissible legislation under the Federal Constitution.

(4) That all matters raised in the pleadings which are outside the jurisdiction of the three judge court are retained for consideration by the requesting judge.

This the 19th day of November, 1974.

Entered By Direction Of The Court:
/s/ H. David Hermansdorfer, Judge

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 1761

TURNER ELKHORN MINING COMPANY,
a Kentucky Corporation, ET AL,

Plaintiffs,

VS: MEMORANDUM OPINION

PETER J. BRENNAN, Secretary of the United States Department of Labor, an Agency of the Federal Government, and CASPAR W. WEINBERGER, Secretary of the United States Department of Health, Education and Welfare, an Agency of the Federal Government,

Defendants.

Before: LIVELY, Circuit Judge, and MOYNAHAN and HERMANSDORFER, District Judges

This action constitutes a facial attack upon the constitutionality of portions of Subchapter IV, Black Lung Benefits, of the Federal Coal Mine Health and Safety Act of 1969, Pub. L. 91-173, Dec. 30, 1969, 83 Stat. 792, as amended by the Black Lung Benefits Act of 1972, Pub. L. 93-303, May 19, 1972, 86 Stat. 925, 30 U.S.C. 901 *et seq.* Plaintiffs are twenty-two (22) coal mine operators who charge the Act violates rights secured under the Fifth Amendment to the Federal Constitution. The defendants are the Sec-

retaries of the United States Departments of Labor and Health, Education and Welfare.

Jurisdiction is invoked and found under 28 U.S.C. 2282. Such jurisdiction is limited to a consideration of the Act and does not extend to a consideration of administrative regulations, *William Jameson & Co.* v. *Morgenthau,* 307 U.S. 171 (1939); *Sardino* v. *Federal Reserve Bank of New York,* 361 F.2d 106 (1966), cert. denied 385 U.S. 898 (1966), which are within the jurisdiction of a single judge court. Further, we consider only the facial attack made upon portions of the Act and not its implementation to any specific claim for benefits.

Perspective may be had in considering the questions presented by first noticing the general legislative plan incorporated in the Federal Coal Mine Health and Safety Act as amended. The Act is structured in terms of a preamble and five (5) major subchapters, each of which is devoted to a separate legislative concern. Our present efforts are concerned only with portions of Subchapter IV. This subchapter, denominated "Black Lung Benefits", is comprised of three (3) primary subdivisions entitled respectively "Part A—General Provisions"; "Part B—Claims for Benefits Filed On Or Before December 31, 1972"; and, "Part C—Claims for Benefits After December 31, 1972". Of these subdivisions our attention is directed to Parts B and C only.

Part B of Subchapter IV deals principally with benefits for total disability or death arising from pneumoconiosis which are to be determined and paid by the Federal Government. Eligibility and standards for processing claims are provided by sections 921 through 924. The final section in Part B, section 925, establishes a transition period,

June 30, 1973 to December 31, 1973, during which federal participation as payee of benefits is phased out and state administration of liability through workmen's compensation coverage with federally approved standards, 30 U.S.C. 931, or direct liability on coal mine operators, 30 U.S.C. 932, is assumed.

Part C directly deals with conditions under which the Secretary of Labor will certify state workmen's compensation laws as complying with federal standards, or, if such compliance is not found, imposition of liability on the coal mine operators. In the circumstances of direct liability upon a coal mine operator, the Act specifically recognizes the requirement of an employment nexus between the coal miner or those claiming in respect of a deceased coal miner and the particular coal mine operator against whom the claim is made. Pursuant to Part C, section 932(a), liability devolves to such operator "with respect to death or total disability due to pneumoconiosis *arising out of employment in such coal mine*"; and, under section 932(c), it is provided that there is *no liability* on such operator for benefits "*due to pneumoconiosis which did not arise, at least in part, out of employment in such mine during the period when it was operated by such operator*".[1] (Emphasis added)

Further, claims must be filed within the limitations period established by the Act. Under Part B a claim must be filed generally by December 31, 1973; the exceptions

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[1] This may include liability from a prior operator's business if such prior operator operated the coal mine on or after December 30, 1969, the effective date of the Act. The prior operator is not, however, relieved of liability by this provision. 30 U.S.C. 932(i)(2).

may result in an extension of six (6) months from December 31, 1973 under sections 922(a)(3), 924. Part C requires the claim to be filed within three (3) years of the discovery of total disability or of death from pneumoconiosis, section 931(b)(2)(D), except in the case of a living miner whose eligibility is established under section 921(c)(4) where the claim of miners engaged in coal mining for more than fifteen (15) years must be filed within three (3) years of the last exposure to disease employment, or in the event of death, within fifteen (15) years of the last exposure employment. 30 U.S.C. 932(f)(1)(2).

Argument is made that the statutory scheme outlined for assessing liability on the coal mine operator for those miners no longer in the work force is irrational and amounts to reparations in favor of the coal miners against the coal industry. The rational approach, argue plaintiffs, is the workmen's compensation approach where the risk of injury or disease is insured against during the employee's period of employment and the economic burden thereby incurred is spread to the public through the pricing mechanism. To impose what plaintiffs believe will be a severe economic burden on the coal industry for total disability or death arising from periods of employment of miners when the disease has not been recognized[2] and no methods of protecting the industry from that risk were taken, is argued as constitutionally impermissible. Plaintiffs cite a multi-issue railroad pension case, *Retirement Board* v. *Alton R. Co.*, 295 U.S. 330 (1935), which held that a requirement for interstate carriers to pay a retirement allowance

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[2] There was testimony and information, eg. Senator Javits, to the effect that pneumoconiosis was not recognized in the United States until the mid-1950's. *1969 Legislative History 339.*

to persons who were in the service within one (1) year of the Act was arbitrary and unreasonable. Mr. Chief Justice Hughes and those justices joining him in dissent did, in fact, concur in the majority's holding on that particular question. 295 U.S. 389. We hold, however, that the *Alton* decision is distinguishable. There, any person who was employed within one (1) year of the date of the Act was to be awarded benefits even though such person may have been discharged for cause or severed employment for a reason incompatible with the imposition of implied *quasi-contract* responsibility to pay such allowance for retirement. The Court in *Alton* recognized a fundamental difference between compensation type laws which deal with existing rights and liabilities and the Act there under consideration which sought to impose "a new incident, without reference to any existing obligation or legal liability", upon the employer-employee relationships. 295 U.S. at 369-71. In the instant case the Act imposes liability upon a coal operator only if standards sounding in tort are met: (1) a claim is timely filed; (2) a prior employment nexus is established; (3) the claim is based on pneumoconiosis arising, at least in part, from such employment; and, (4) the coal miner has become totally disabled or has died from pneumoconiosis. Those factors not only distinguish *Alton, supra,* but manifest a logical and rational basis for the assertion of liability.

In assessing the argument against imposition of remote claims where the responsible party did not insure against that particular risk because it was unknown to the coal industry at large, we are not persuaded that fact makes the Act unreasonable. Clearly, plaintiffs have cited no binding or persuasive authority showing that such liability for remote claims violates safeguards of the Federal Constitu-

tion. This Court may not, under *U.S.* v. *Carolene Products Co.*, 304 U.S. 144, 145 (1938), superimpose its judgment on that of Congress:

> ". . . where the legislative judgment is drawn into question, [judicial inquiry] must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it. . . . As that decision was for Congress, neither the finding of a court arrived at by weighing the evidence, nor the verdict of a jury can be substituted for it."

We find that the manner in which liability is assessed is rational, and the decision of Congress to impose it on what may be called remote claims of those former miners no longer in the work force was an exercise of its lawful power under the Constitution.

The statutory manner of imposing and implementing such liability as the Act imposes upon coal mine operators under the Act presents a separate and distinct issue of several parts.

First, the Act identifies a particular disease which, when manifest in an advanced state in coal miners, may cause total disability or death. There is no doubt that the Congress elected to avoid precise medical terminology in defining pneumoconiosis, section 902(b):

> "The term "pneumoconiosis" means a chronic dust disease of the lung arising out of employment in a coal mine."

No meaningful argument has been presented challenging the power of Congress to make such definition after receiving conflicting medical evidence about the disease.[3] The

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[3] The committee reports abound with such conflict. A summary is presented in *U.S. Code, Cong. and Admin. News,* 92d Cong., Second Session, 1972, p. 2315.

naming of the disease or its components in this instance is of more academic than legal significance. *U.S.* v. *Carolene Products Co., supra.* We hold the definition is neither arbitrary nor unreasonable.

Second, under part B of the Act at section 921(c) there are four (4) statutory presumptions made in aid of a claimant's efforts to secure benefits. Plaintiffs have standing to attack these presumptions under section 925 where the Secretary's finding of liability during the transition are binding on the operators and, as to the last presumption, under section 932(f)(2), where it is specifically incorporated into Part C as a basis for benefit eligibility. The provisions of section 921(c) are:

> "For the purposes of this section—
>
> "(1) if a miner who is suffering or suffers from pneumoconiosis was employed for ten years or more in one or more coal mines there shall be a rebuttable presumption that his pneumoconiosis arose out of such employment;
>
> "(2) if a deceased miner was employed for ten years or more in one or more coal mines and died from a respiratory disease there shall be a rebuttable presumption that his death was due to pneumoconiosis;
>
> "(3) if a miner is suffering or suffered from a chronic dust disease of the lung which (A) when diagnosed by chest roentgenogram, yields one or more large opacities (greater than one centimeter in diameter) and would be classified in category A, B, or C in the International Classification of Radiographs of Pneumoconioses by the International Labor Organization, (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung, or (C) when diagnosis is made by either means, would be a condition which could reasonably be expected to yield results described in clause (A) or (B), then there shall be an irrebuttable presumption that he is totally disabled due to pneumo-

coniosis, or that at the time of his death he was totally disabled by pneumoconiosis, as the case may be; and

"(4) if a miner was employed for fifteen years or more in one or more underground coal mines, and if there is a chest roentgenogram submitted in connection with such miner's . . . claim under this title, and it is interpreted as negative with respect to the requirements of paragraph (3) of this subsection, and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis, or that at the time of this death he was totally disabled by pneumoconiosis. . . . The Secretary may rebut such presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine."

Plaintiffs make the argument that the presumptions presented by statute are irrational and amount to de facto irrebuttable presumptions. In *Tot* v. *United States,* 319 U.S. 463 (1943), the Court, relying upon its decision in Mobile, *J. & K. C. R. Co.* v. *Turnipseed,* 219 U.S. 35 (1910), held that the controlling test for determining the validity of a statutory presumption was "that there be a rational connection between the facts proved and the facts presumed". 319 U.S. at 467. The Court wrote:

> "Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed." See *Leary* v. *United States,* 395 U.S. 6, 33 (1969).

The function of a rebuttable presumption is simply to shift the burden of proof. We do not doubt that Congress has the power to make such presumptions.

In the medical testimony received by the Congress there was no significant disparity as to the fact that exposure in a coal mine for a period of ten (10) years would typically present a medically identifiable case of advanced or complicated pneumoconiosis. Thus, a rebuttable presumption that after ten (10) years, as established in presumptions (1) and (2) of section 921(c), a coal miner has pneumoconiosis arising from his employment may be sustained; provided, that in the case of a coal miner with multiple employer experience of a period of ten (10) or more years, the presumption is not used as a basis for identifying one of such employers as being responsible under the Act. Such a determination involves fact questions which were not, or hardly could be, established before the Congress. Curiously, Congress did not legislate directly upon this critical selection process or establish standards for rule making, but rather, delegated the entire problem to the Secretary of Labor. 30 U.S.C. 932(h). There is no dispute that Congress has the power to make such a delegation. Accordingly, that delegation can only be deemed proper.

The irrebuttable presumption contained in section 921 (c)(3) not only involves a presumption of the existence of pneumoconiosis but forecloses all fact finding as to the effect of that disease upon a particular coal miner upon a clinical finding of the presence of a chronic dust disease of the lung of a coal miner. The pattern adopted in section 921(c)(3) is a departure from the overall pattern of the Act which makes the existence of both the disease and disability two (2) separate factors which must be established before liability is imposed. The statutory definition of total disability involves factual issues distinct from clinical findings. 30 U.S.C. 902(f):

> "The term 'total disability' has the meaning given it by the regulation of the Secretary of Health, Education and Welfare, except that such regulation shall provide that a miner shall be considered totally disabled *when pneumoconiosis prevents him from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he previously engaged with some regularity and over a substantial period of time.* Such regulation shall not provide more restrictive criteria than those applicable under section 223(d) of the Social Security Act." (Emphasis supplied)

To the extent that such presumption purports to making a finding of total disability in terms other than those provided by the Act as standards for total disability, it is unreasonable and arbitrary. As written, section 921(c)(3) is violative of due process in precluding the opportunity to present evidence as to the effect of a chronic dust disease upon an individual in determining whether or not he is disabled. *Heiner* v. *Donnan,* 285 U.S. 312, 329 (1932); *Stanley* v. *Illinois,* 405 U.S. 645 (1973); *Vlandis* v. *Kline,* 412 U.S. 441 (1973).

The final rebuttable presumption provided by section 921(c)(4) differs from all other statutory presumptions of section 921(c) in that it provides the standard "and, if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment", then the employment experience of fifteen (15) years together with such other evidence may be used to support a rebuttable presumption. In this construction "other evidence" of total disability would by traditional rules of statutory construction imply evidence of total disability within the meaning of the Act as opposed to a finding of total disability in every case solely upon clinical evidence of a chronic dust

disease. Given this construction the presumption contained in section 921(c)(4) passes constitutional muster. This presumption merely makes certain that a negative x-ray does not become conclusive evidence that there is no mine-related disability arising from pneumoconiosis.

Third, within the language of section 921(c)(4), but outside the enactment of the presumption itself, is the following:

> "The Secretary may rebut such presumption only by establishing (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine."

We declare this limitation upon evidence to rebut the presumption that such disability is due to pneumoconiosis established by section 921(c)(4) to be invalid as arbitrary and unreasonable. Congress has made no finding that pneumoconiosis *per se* is disabling. Quite to the contrary, Congress has recognized that the disease must produce total disability or death before any operator may be held liable for benefits. 30 U.S.C. 932. It has been judicially determined that pneumoconiosis, like any other disease, is not disabling per se. Cf. *Rose* v. *Cohen,* 406 F.2d 753 (6th Cir. 1969); *Hall* v. *Weinberger,* No. 1375 (E.D. Ky. 1973) *aff'd mem.* No. 73-1871 (6th Cir. 1974). Since, under section 925, the operator is bound by the Secretary's finding of liability under Part B, the operator may attack the application of this limitation. To require rebuttal evidence that a coal miner did not have pneumoconiosis is irrational where liability is not predicated on the mere presence of the disease, but rather on a complicated state of the disease.

Further, the liability established under section 932(c) specifically exonerates a coal operator of liability for ben-

efits "which did not arise, at least in part, out of employment in such mine during the period when it was operated by such operator". There is no rational basis upon which the burden of proving that the impairment "did not arise out of, or in connection with employment in a coal mine"[4] can be placed upon a specific potentially liable coal mine operator. Such operator must be found liable under the Act for his mine's involvement in the disease, if any.

Fourth, no basis is shown, and we can find none, upon which Congress may deprive a litigant of the right to produce whatever evidence may be admissible generally in attempting to rebut a presumption without offending due process.

We are persuaded that none of our holdings in this matter affect the facial constitutionality of the Act *per se.* Excising those matters found to be constitutionally offensive(we hold that the Act is left substantially unimpaired, and no essential part of the legislative plan has been at-

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[4] It has been suggested that as section 932(c) provides that no benefit is payable by any operator for death or total disability which did not arise, at least in part, out of employment in a mine during the period when it was operated by such an operator, then the presumption dealt with in section 921(c)(4) could be construed when applied to an operator's liability under Part C, to mean "employment in *its* coal mine" rather than "employment in *a* coal mine" as written. It is questionable whether this Court has the authority to so construe the plain language of an Act of Congress and, in this instance, declines to entertain the suggestion.

tacked successfully.[5] The Secretary shall no longer seek to apply the irrebuttable presumption made by section 921 (c)(3) or to limit evidence in rebuttal to the presumption created in section 921(c)(4). All other provisions of the Act which have been considered are hereby declared to be permissible legislation under the Federal Constitution.

All matters raised in the pleadings which are outside the jurisdiction of this Court are retained for consideration by the requesting judge.

An order in conformity with this Memorandum Opinion shall be entered forthwith.

This the 19th day of November, 1974.

Entered By Direction Of The Court:
/s/ H. David Hermansdorfer, Judge

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[5] We note that a similar but in part distinguishable case involving the Act and regulations is *National Independent Coal Operator's Association* v. *Brennan*, 372 F.Supp. 16 (D. D.C. 1974), affirmed without opinion, ... U.S. ...., No. 73-1902, October 29, 1974. The opinion of the District of Columbia Court does not touch directly the matters found constitutionally objectionable in the instant case. The closest point of convergence is found in the *Brennan* decision's Conclusions of Law (v), 372 F.Supp. at 24:

> "Pursuant to Sections 422(h) and 422(f)(2) of the Act, the Secretary of Labor properly promulgated regulations applying the Section 411 presumptions to Section 422 operator liability. Therefore, the *statutory provisions pursuant to which the Secretary's regulations were promulgated* do not and will not deprive the plaintiffs in No. 1711-73 of their property without due process of law or deny them equal protection of the law." (Emphasis added.)

This conclusion holds that sections 422(h) and (f)(2) are valid. It does not consider the validity of section 411(c) of the Act. Our consideration of these issues, therefore, is not precluded nor are the issues mooted by the decision of the Supreme Court.

APPENDIX C

In The
UNITED STATES DISTRICT COURT
For the Eastern District tof
Kentucky at Pikeville

CIVIL ACTION NO. 1761

TURNER ELKHORN MINING COMPANY, et al.,

Plaintiffs,

vs.

PETER J. BRENNAN, Secretary of the United States Department of Labor, and CASPAS W. WEINBERGER, Secretary of the United States Department of Health, Education and Welfare,

Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Turner Elkhorn Mining Company, et al, plaintiffs herein, hereby appeal to the Supreme Court of the United States from Paragraph (3) of the Judgment Order entered in this action on November 19, 1974.

This appeal is taken pursuant to 28 U.S.C. § 1253.

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By /s/ James M. Graves
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of January, 1975, copies of the foregoing Notice of Appeal to the Supreme Court of the United States were mailed, postage prepaid, to

The Solicitor General
United States Department of Justice
Washington, D.C. 20530

Frank A. White, Esq.
United States Department of Labor
14th and Constitution Avenue, N.W.
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10th and Constitution Avenue, N.W.
Washington, D.C. 20530

I FURTHER CERTIFY that all parties required to be served have been served.

/s/ James M. Graves
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APPENDIX D

TITLE IV OF THE FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969

83 Stat. 742 (30 U.S.C. §901, *et seq.*), as amended by the Black Lung Benefits Act of 1972, 86 Stat. 150.

TITLE IV — BLACK LUNG BENEFITS

Part A — General

Sec. 401; 30 USC §901:

Congress finds and declares that there are a significant number of coal miners living today who are totally disabled due to pneumoconiosis arising out of employment in one or more of the Nation's coal mines; that there are a number of survivors of coal miners whose deaths were due to this disease or who were totally disabled by this disease at the time of their deaths; and that few States provide benefits for death or disability due to this disease or who were totally disabled by this disease at the time of their deaths to coal miners or their surviving dependents. It is, therefore, the purpose of this subchapter to provide benefits, in cooperation with the States, to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to such disease or who were totally disabled by this disease at the time of their deaths; and to ensure that in the future adequate benefits are provided to coal miners and their dependents in the event of their death or total disability due to pneumoconiosis.

Sec. 402; 30 USC §902:

For purposes of this title—

• • •

(b) The term "pneumoconiosis" means a chronic dust disease of the lung arising out of employment in a coal mine.

(c) The term "Secretary" where used in part B means the Secretary of Health, Education, and Welfare, and where used in part C means the Secretary of Labor.

(d) The term "miner" means any individual who is or was employed in a coal mine.

• • •

(f) The term "total disability" has the meaning given it by regulations of the Secretary of Health, Education, and Welfare, except that such regulations shall provide that a miner shall be considered totally disabled when pneumoconiosis prevents him from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he previously engaged with some regularity and over a substantial period of time. Such regulations shall not provide more restrictive criteria than those applicable under section 423 (d) of Title 42.

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Part B — Claims for Benefits Filed on or Before December 31, 1973

Sec. 411; 30 USC §921:

(a) The Secretary shall, in accordance with the provisions of this part, and the regulations promulgated by him under this part, make payments of benefits in respect of total disability of any miner due to pneumoconiosis, and in respect of the death of any minor whose death was due to pneumoconiosis or who at the time of his death was totally disabled by pneumoconiosis.

(b) The Secretary shall by regulation prescribe standards for determining for purposes of subsection (a) of this section whether a miner is totally disabled due to pneumoconiosis and for determining whether the death of

a miner was due to pneumoconiosis. Regulations required by this subsection shall be promulgated and published in the Federal Register at the earliest practicable date after December 30, 1969, and in no event later than the end of the third month following December 1969. Final regulations required for implementation of any amendments to this subchapter shall be promulgated and published in the Federal Register at the earliest practicable date after the date of enactment of such amendments, and in no event later than the end of the fourth month following the month in which such amendments are enacted. Such regulations may be modified or additional regulations promulgated from time to time thereafter.

(c) For purposes of this section—

(1) If a miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more coal mines there shall be a rebuttable presumption that his pneumoconiosis arose out of such employment;

(2) If a deceased miner was employed for ten years or more in one or more coal mines and died from a respirable disease there shall be a rebuttable presumption that his death was due to pneumoconiosis;

(3) If a miner is suffering or suffered from a chronic dust disease of the lung which (A) when diagnosed by chest roentgenogram, yields one or more large opacities (greater than one centimeter in diameter) and would be classified in category A, B, or C in the International Classification of Radiographs of the Pneumoconioses by the International Labor Organization, (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung, or (C) when diagnosis is made by other means, would be a condition which could reasonably be expected to yield results described in clause (A) or (B) if diagnosis had been made in the manner prescribed in clause (A) or (B), then there shall be an irrebuttable presumption that he is totally disabled due to pneumoconiosis or that his

death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis, as the case may be; and

(4) If a miner was employed for fifteen years or more in one or more underground coal mines, and if there is a chest roentgenogram submitted in connection with such miner's, his widow's, his child's, his parent's, his brother's, his sister's, or his dependent's claim under this subchapter and it is interpreted as negative with respect to the requirements of paragraph (3) of this subsection, and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis. In the case of a living miner, a wife's affidavit may not be used by itself to establish the presumption. The Secretary shall not apply all or a portion of the requirement of this paragraph that the miner work in an underground mine where he determines that conditions of a miner's employment in a coal mine other than an underground mine were substantially similar to conditions in an underground mine. The Secretary may rebut such presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine.

(d) Nothing in subsection (c) of this section shall be deemed to affect the applicability of subsection (a) of this section in the case of a claim where the presumptions provided for therein are inapplicable.

Sec. 413; 30 USC §923:

(a) Except as otherwise provided in section 924 of this title, no payment of benefits shall be made under this part

except pursuant to a claim filed therefor on or before December 31, 1973, in such manner, in such form, and containing such information, as the Secretary shall by regulation prescribe.

(b) In carrying out the provisions of this part, the Secretary shall to the maximum extent feasible (and consistent with the provisions of this part) utilize the personnel and procedures he uses in determining entitlement to disability insurance benefit payments under section 423 of Title 42, but no claim for benefits under this part shall be denied solely on the basis of the results of a chest roentgenogram. In determining the validity of claims under this part, all relevant evidence shall be considered, including, where relevant, medical tests such as blood gas studies, X-ray examination, electrocardiogram, pulmonary function studies, or physical performance tests, and any medical history, evidence submitted by the claimant's physician, or his wife's affidavits, and in the case of a deceased miner, other appropriate affidavits of persons with knowledge of the miner's physical condition, and other supportive materials. Claimants under this part shall be reimbursed for reasonable medical expenses incurred by them in establishing their claims. For purposes of determining total disability under this part, the provisions of subsections (a), (b), (c), (d), and (g) of section 421 of Title 42 shall be applicable. The provisions of sections 404, 405(a), (b), (d), (e), (f), (g), (h), (j), (k), and (l), 406, 407, and 408 of Title 42 shall be applicable under this part with respect to a miner, widow, child, parent, brother, sister or dependent, as if benefits under this part were benefits under subchapter II of chapter 7 of Title 42.

(c) No claim for benefits under this section shall be considered unless the claimant has also filed a claim under the applicable State workmen's compensation law prior to or at the same time his claim was filed for benefits under this section; except that the foregoing provisions of this paragraph shall not apply in any case in which the filing of a claim under such law would clearly be futile because

the period within which such a claim may be filed thereunder has expired or because pneumoconiosis is not compensable under such law, or in any other situation in which, in the opinion of the Secretary, the filing of a claim would clearly be futile.

Part C — Claims for Benefits After December 31, 1973

Sec. 421; 30 USC §931:

(a) On and after January 1, 1974, any claim for benefits for death or total disability due to pneumoconiosis shall be filed pursuant to the applicable State workmen's compensation law, except that during any period when miners or their surviving widows, children, parents, brothers, or sisters, as the case may be, are not covered by a State workmen's compensation law which provides adequate coverage for pneumoconiosis they shall be entitled to claim benefits under this part.

* * *

Sec. 422; 30 USC §932:

(a) During any period after December 31, 1973, in which a State workmen's compensation law is not included on the list published by the Secretary under section 931(b) of this title, the provisions of Public Law 803, 69th Congress (44 Stat. 1424, approved March 4, 1927), as amended (other than the provisions contained in sections 1, 2, 3, 4, 8, 9, 10, 12, 13, 29, 30, 31, 32, 33, 37, 38, 41, 43, 44, 45, 46, 47, 48, 49, 50, and 51 thereof) shall (except as otherwise provided in this subsection and except as the Secretary shall by regulation otherwise provide), be applicable to each operator of coal mine in such State with respect to death or total disability due to pneumoconiosis arising out of employment in such mine. In administering this part, the Secretary is authorized to prescribe in the Federal Register such additional provisions, not inconsistent with those specifically excluded by this subsection, as he deems neces-

sary to provide for the payment of benefits by such operator to persons entitled thereto as provided in this part and thereafter those provisions shall be applicable to such operator.

(b) During any such period each such operator shall be liable for and shall secure the payment of benefits, as provided in this section and section 933 of this title.

(c) Benefits shall be paid during such period by each such operator under this section to the categories of persons entitled to benefits under section 922(a) of this title in accordance with the regulations of the Secretary and the Secretary of Health, Education, and Welfare applicable under this section: *Provided,* That, except as provided in subsection (i) of this section, no benefit shall be payable by any operator on account of death or total disability due to pneumoconiosis which did not arise, at least in part, out of employment in a mine during the period when it was operated by such operator.

(d) Benefits payable under this section shall be paid on a monthly basis and, except as otherwise provided in this section, such payments shall be equal to the amounts specified in section 922(a) of this title.

(e) No payment of benefits shall be required under this section:

(1) except pursuant to a claim filed therefor in such manner, in such form, and containing such information, as the Secretary shall by regulation prescribe;

(2) for any period prior to January 1, 1974; or

(3) for any period after twelve years after December 30, 1969.

(f) (1) Any claim for benefits under this section shall be filed within three years of the discovery of total disability due to pneumoconiosis or, in the case of death due to pneumoconiosis, the date of such death.

(2) Any claim for benefits under this section in the case of a living miner filed on the basis of eligibility under section 921(c) (4) of this title, shall be filed within three

years from the date of last exposed employment in a coal mine or, in the case of death from a respiratory or pulmonary impairment for which benefits would be payable under section 921(c) (4) of this title, incurred as the result of employment in a coal mine, shall be filed within fifteen years from the date of last exposed employment in a coal mine.

(g) The amount of benefits payable under this section shall be reduced, on a monthly or other appropriate basis, by the amount of any compensation received under or pursuant to any Federal or State workmen's compensation law because of death or disability due to pneumoconiosis.

(h) The regulations of the Secretary of Health, Education, and Welfare promulgated under section 921 of this title shall also be applicable to claims under this section. The Secretary of Labor shall by regulation establish standards, which may include appropriate presumptions, for determining whether pneumoconiosis arose out of employment in a particular coal mine or mines. The Secretary may also, by regulation, establish standards for apportioning liability for benefits under this subsection among more than one operator where such apportionment is appropriate.

(i) (1) During any period in which this section is applicable with respect to a coal mine an operator of such mine who, after December 30, 1969, acquired such mine or substantially all the assets thereof from a person (hereinafter referred to in this paragraph as a "prior operator") who was an operator of such mine on or after the operative date of this subchapter shall be liable for and shall, in accordance with section 933 of this title, secure the payment of all benefits which would have been payable by the prior operator under this section with respect to miners previously employed in such mine if the acquisition had not occurred and the prior operator had continued to operate such mine.

(2) Nothing in this subsection shall relieve any prior operator of any liability under this section.

Sec. 430; 30 USC §940:

The amendments made by the Black Lung Benefits Act of 1972 to part B of this subchapter shall, to the extent appropriate, also apply to this part: *Provided,* That for the purpose of determining the applicability of the presumption established by section 921(c) (4) of this title to claims filed under this part, no period of employment after June 30, 1971, shall be considered in determining whether a miner was employed at least fifteen years in one or more underground mines.